

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 24, 2003

IN RE:

COMPLAINT OF US LEC OF TENNESSEE, INC.
AGAINST ELECTRIC POWER BOARD OF
CHATTANOOGA

)
)
) Docket No. 02-00562
)
)

ORDER DENYING PETITION FOR PARTIAL RECONSIDERATION
OF THE ORDER ON THE MOTION FOR SUMMARY JUDGMENT
OF THE ELECTRIC POWER BOARD OF CHATTANOOGA

This matter came before a Hearing Officer of the Tennessee Regulatory Authority ("Authority" or "TRA") on the *Petition for Partial Reconsideration* filed by US LEC of Tennessee, Inc. ("US LEC") on July 11, 2003.

Background

On June 28, 2003, the Hearing Officer issued the *Order on Summary Judgment*, which granted in part, denied in part and held in abeyance in part the *Supplemental Memorandum in Support of Motion for Summary Judgment* filed by the Electric Power Board of Chattanooga ("EPB") on February 13, 2003. The *Order on Summary Judgment* specifically addressed US LEC's claim that through the use of the name "EPB," EPB's telecommunications division receives a benefit from the good will created and maintained by the electric division in violation of Tenn. Code Ann. § 7-52-402. US LEC supported this allegation with public statements emanating from EPB which purportedly blurred the separateness of the telecommunications and the electric divisions of EPB.

The *Order on Summary Judgment* differentiated between EPB's use of that name for identification purposes and its efforts to jointly market its telecommunications and electric divisions, stating:

Insofar as US LEC alleges that mere use of the name EPB, without more, constitutes a subsidy, US LEC has presented no legal or evidentiary support for its claim. The record shows that EPB applied for its CCN under that name and has been using it since 1998. Absent some evidentiary showing of a tangible benefit accruing solely from the use, for identification purposes, of a name reflecting an approved and accurate affiliation, it cannot be said that such use constituted a subsidy in violation of Tenn. Code Ann. § 7-52-402. Accordingly, summary judgment is appropriate on the claim related to the use of the appellation "EPB."

US LEC's allegation that the joint marketing of EPB's telecommunications and electric divisions constitutes a subsidy and violates the Code of Conduct to which EPB agreed to conform raises questions that require further examination. In its defense, EPB counters that it has not engaged in joint marketing in violation of the Code of Conduct.¹ In its *Response to Motion for Summary Judgment*, US LEC presents evidence, from advertising and the EPB webpage, giving the impression that EPB's telecommunications and electric divisions are the same entity. EPB did not respond to this evidence and failed to address the cross-subsidization issue in the context of this marketing activity. Thus, genuine issues of material fact remain to be tried regarding whether such marketing activity constitutes a subsidy and/or violates the Code of Conduct to which EPB agreed to conform.

Thus, summary judgment was granted on that part of US LEC's claim that the mere use of the name EPB constituted cross-subsidization, but denied as to whether EPB's efforts to jointly market its telecommunications and electric divisions constituted cross-subsidization.

¹ The Code of Conduct states in pertinent part:

Joint Marketing of Regulated and Nonregulated Services - The electric system and the telecommunications division of the Electric Power Board of Chattanooga may jointly offer their respective products and services to customers provided that the customer is informed (a) of the separate identities of each and (b) that the products and services of the electric utility system are distinct and separately priced from the offerings of the telephone division and the customer may select one without the other.

On July 11, 2003, US LEC filed the *Petition for Partial Reconsideration*, arguing that the *Order on Summary Judgment* requires reconsideration or clarification because the two findings mentioned above, granting summary judgment on the use of the name EPB and denying it on the joint marketing efforts, could potentially conflict. US LEC maintains that

[i]f as US LEC has requested, the TRA decides to clarify and strengthen the Code of Conduct “to prevent EPB Telecom from leveraging the good will and reputation of EPB electric” (Response to Motion for Summary Judgment, at 3) the TRA could decide to order EPB Telecom to use a different name for marketing purposes. . . US LEC is concerned that one potential remedy to this problem [of confusion of the two divisions caused by joint marketing] – of ordering EPB Telecom to market its services under another name – may be foreclosed by the Hearing Officer’s ruling.²

On July 18, 2003, EPB filed its *Response to Petition for Partial Reconsideration*, arguing that the findings do not conflict.

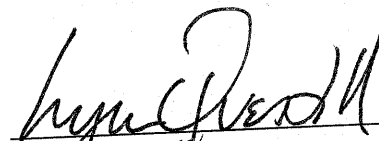
Findings and Conclusions

The *Order on Summary Judgment* differentiated between the use of EPB’s name for identification purposes and marketing purposes. Summary judgment was granted only on the claim that the mere use of the EPB name strictly for identification purposes constituted cross-subsidization. Any issues regarding the “leveraging” of the name EPB in the context of joint marketing involving the electric and telecommunications divisions remain to be tried. The *Order on Summary Judgment* did not address or foreclose any specific remedies related to this issue. Accordingly, the *Petition for Partial Reconsideration* is denied.

² *Petition for Partial Reconsideration*, p. 2 (July 11, 2003).

IT IS THEREFORE ORDERED THAT:

The *Petition for Partial Reconsideration* filed by US LEC of Tennessee, Inc. is denied.


Lynn Questell,
Hearing Officer